

Top International Trade Rulings Of 2023 So Far

By Jennifer Doherty

Law360 (July 18, 2023, 10:15 PM EDT) -- Years of litigation over tariff regimes covering Chinese goods and foreign steel and aluminum largely wrapped up earlier this year, while the trade court reopened questions around the legal meaning of "substantial transformation."

Here are Law360's picks for the top international trade decisions of 2023 so far.

China Section 301 Tariffs Affirmed

The three-judge panel overseeing the U.S. Court of International Trade's case over landmark tariffs on Chinese products doused the second half of importers' two-pronged challenge to the so-called Section 301 duties back in March, affirming the Trump administration's expansion of the levies.

The court was relatively quick to endorse the president's power to expand the tariff program's reach amid a tit-for-tat escalation of trade tensions with Beijing last year. But the judges took longer to decide whether the Office of the U.S. Trade Representative had violated the Administrative Procedure Act by failing to address many of the thousands of comments it received opposing plans for third and fourth rounds of tariffs.

The importers argued that U.S. Supreme Court precedent allows federal agencies to correct weak explanations for how they addressed public comments, but lack of consideration required the agency to start over. In the importers' view, USTR fell into the second camp, offering only after-the-fact rationalizations to tie its actions to comments from the public.

The trade court disagreed, holding that recent federal court decisions "do not distinguish between failures of explanation and failures of consideration," and that explanations USTR provided on remand "do not offer new determinative reasons for its actions."

The importers have since launched an appeal, and USTR is now engaged in its four-year review of the tariff program's effectiveness, keeping tight-lipped on when that determination might come down or what it might look like.

Treasury Secretary Janet Yellen offered perhaps the clearest insight into the Biden administration's stance on the program over the weekend, telling reporters it would be "premature" to lift the duties when China has not addressed the unfair trade practices that spurred the Section 301 tariffs in the first place.

The case is HMTX Industries LLC et al. v. United States, case number 1:21-cv-00052, in the U.S. Court of International Trade.

National Security Tariffs Head for Liquidation

While the trade court has been more sympathetic to importers challenging various aspects of the national security levies than it has been to opponents of the Section 301 duties, the Federal Circuit has affirmed national security duties on steel and aluminum duties at every turn.

"No surprises over the past six months," said Wiley Rein LLP partner Christopher B. Weld in summing up the most recent decisions, which all but wrapped four years of litigation over tariffs under Section 232 of the Trade Expansion Act.

"There's been just a steady slew of challenges to the legal authority of presidential action under 232, and the courts have steadily upheld broad authority of the president to act under 232, from a substantive tariff standpoint, but also from a procedural standpoint," said Weld, whose firm represents domestic petitioners.

The latest round of Section 232 decisions started in February, when the Federal Circuit **reversed** a win for PrimeSource Building Products and other companies challenging the Trump administration's decision to expand the duties on raw steel and aluminum to include derivative products like nails. The circuit panel issued an order this month officially ending the appeal despite a request from PrimeSource to hold off while the company prepared to petition the Supreme Court.

In March, the circuit court again backed the government, holding that anti-dumping duties couldn't include national security tariffs in the price of subject imports, which would lower the anti-dumping duties.

Also in March, the Supreme Court declined to hear a case over just how threatening imports have to be to qualify for Section 232 treatment. The Federal Circuit ruled last year that a national security risk does not have to be "imminent" to spur the government to action.

The cases are Primesource Building Products Inc. v. Biden et al., case number 21-2066, Oman Fasteners LLC et al. v. Biden et al., case number 21-2252, and Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. U.S., case number 21-2097, in the U.S. Court of Appeals for the Federal Circuit and USP Holdings Inc. v. U.S., case number 22-565, in the U.S. Supreme Court.

Cyber Power Systems Reopens "Substantial Transformation"

CIT Judge Leo M. Gordon's February opinion in Cyber Power Systems Inc.'s case involving electronics assembled in the Philippines using Chinese components tackled the government's changing approach to determining whether a component has undergone substantial transformation and qualifies for a new country of origin, but fell short of hopes.

"There was optimism that the decision could help clarify and create a brighter line test that importers could use to determine origin. But we didn't end up there," said John Brew, co-chair of Crowell & Moring LLP's international trade group.

Instead, the importer's failure to show exactly what processing its products underwent "ended up being the death knell," he said.

Nevertheless, the opinion did reassert the traditional "name-character-use test," which evaluates substantial transformation on the basis of whether those three attributes changed during the assembly process, over the government's favored test, which would have focused only on where a product's "essential" component originated.

"The Cyber Power Systems case really had three decisions, and they definitely call into question, I think, some of the Customs decisions that were sort of focused on the predetermined end use of key components," Kelley Drye & Warren LLP partner Joshua Morey told Law360.

How much of an impact this decision will have on the substantial transformation question pending a case with stronger facts or a compelling appeal from Cyber Power Systems remains to be seen.

"It's unsettled, at this point, exactly what the correct analysis should be," Morey said.

The case is Cyber Power Systems Inc. v. U.S., case number 1:20-cv-00124, in the U.S. Court of International Trade.

--Editing by Emily Kokoll and Jill Coffey.